No. 12,427

IN THE

United States Court of Appeals

For the Ninth Circuit

COMMODITY CREDIT CORPORATION,
Appellant,

vs.

PETALUMA AND SANTA ROSA RAILROAD COMPANY, a Corporation,
Appellee.

BRIEF FOR APPELLEE

On Appeal from the Judgment of the District Court of the United States for the Northern District of California, Southern Division

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SUBJECT INDEX

TABLE OF CASES CITED

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APPELLEE'S POSITION

(a) Summary of Facts.

It is believed that the facts involved in this litigation are undisputed and that the only question to be determined is with respect to the manner in which a tariff provision of the Great Northern Railway should be interpreted and applied to those facts.

Each of the cars involved had their origin at a point in Canada (R. 36, 50). The last point of loading each car was in Canada at the point of origin (R. 30). The bills of lading issued at each of the points of origin in Canada by the Canadian Pacific Railway showed that the shipments were consigned to the order of the Commodity Credit Corporation at Ogden, Utah (R. 39, 50). It is, therefore, established that each of the shipments was billed originally as a through shipment from a point in Canada to a point in the United States.

An inspection was made of each shipment after it left its point of origin and last point of loading, which inspection was made while the cars were in possession of the Canadian Pacific Railway in Canada (R. 28, 38, 53).

Pursuant to instructions from Commodity Credit Corporation, each of the shipments was diverted from its original destination at Ogden, Utah, to Spokane, Washington. These diversions were accomplished at Sweetgrass, Montana, and in compliance therewith the cars were transported to Spokane, Washington (R. 51, 52).

Each of the shipments was inspected at Spokane, Washington, in accordance with request made by Commodity Credit Corporation (R. 52) and subsequently at the same point the Commodity Credit Corporation ordered the shipments reconsigned to Poultry Producers of Central California at Petaluma, California (R. 52). The diversion orders were accomplished at Spokane, Washington, and each of the cars was transported and ultimately delivered to the billed consignee at Petaluma (R. 52).

The tariff rule which is involved and which must be applied to the foregoing facts is contained in Great North-

ern Railway Company Rules Tariff No. 1240-0, I.C.C. No. A-8071 (Item No. 143), which was in effect at the time each of the shipments was transported (R. 37, 50, 66, 67).

That rule provides that not more than two inspections or one inspection in addition to a diversion without inspection en route will be permitted and that if, after a car has received two inspections or diversions en route authorized in the rule, it is subsequently inspected or diverted it will be subject to a combination of tariff rates applicable on a shipment terminating, and on a shipment originating, at the point at which such subsequent inspection or diversion is performed in effect on date of shipment from point of origin. The reconsigning tariff rule also provides that the number of stops for inspection or diversion shall be reckoned—

1. from the last point of loading car, or
2. from the point at which it becomes subject to combination of rates as provided in this rule.

(b) Summary of Appellee's Argument.

Since the shipments were in the possession of the Great Northern Railway at Spokane, Washington, at the time diversion orders were presented to that carrier by Commodity Credit Corporation, whereby destination of the shipments was changed from Spokane, Washington, to Petaluma, California, there can be no question but that the provision of the Great Northern Railway Rules Tariff referred to herein is applicable to these shipments and must be given consideration. This fact is conceded throughout appellant's brief. The sole question involved is with respect to the manner in which the provision should be

interpreted and with respect to the extent of its applicability.

The tariff rule provided that if, after a shipment had two inspections or one inspection in addition to a diversion without inspection en route, a third inspection or diversion is requested, a combination of rates should be assessed over the third inspection or diversion point It also specifically stated that such inspections or diversions should be counted from the last point of loading or the point at which the shipment became subject to combination of rates, as provided in the tariff rule.

It is the position of appellee that compliance with the plain and unambiguous language of the tariff rule is mandatory under well settled principles of law. As was said in *Pennsylvania Railroad Co. v. International Coal Mining Co.* (1913), 230 U.S. 184, 197, 57 L.Ed. 1446, and quoted with approval in *Davis v. Portland Seed Co.* (1924), 264 U.S. 403, 418, 68 L.Ed. 762:

> "* * * The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

The shipments involved had not become subject to a combination of rates, as provided in the tariff rule, up to the time the diversion was requested at Spokane, and it was therefore necessary under the clear and unequivocal language of the tariff rule to count all inspections or

diversions from the last point of loading (the Canadian point of origin) to ascertain whether the Spokane diversion was the third one which would make necessary the assessment of a combination of rates over that point.

When this is done, it is clear that the inspection and diversion at Spokane, Washington constituted the third such order and made it necessary to apply a combination of rates over that point, as provided in the tariff rule under consideration.

It is immaterial that it was necessary to consider an event that took place in Canada in order to comply with the condition imposed by the tariff rule. The carrier could place any condition it desired in its tariff and that condition is binding upon both a shipper and a carrier. The carrier, for example, could have provided that any car which had been loaded at a certain specified point in Canada would be subject to a combination of rates at Spokane if a diversion was requested at the latter point.

The hypothetical tariff rule, as well as the tariff rule under consideration, might be unreasonable and prejudicial but, if the rule is contained in an applicable tariff, it is binding to the same extent as a statute upon a shipper and a carrier. It is true, of course, that the Interstate Commerce Commission in a proper proceeding before it might strike down the rule because it was unreasonable, but that body alone has power to take such action. The Court cannot do so. *Pennsylvania Railroad Co. v. International Coal Mining Co.* (1913), 230 U.S. 184, 57 L.Ed. 1446.

Appellee's position and the decision of the trial court, reported at 83 Fed. Supp. 639, are supported by informal

decision of the Interstate Commerce Commission which is set forth in Appendix A hereto.[1] It will be noted that the identical fact situation was involved in the Commission proceeding and that the opinion was expressed that all inspections or diversions from the Canadian point of origin, whether they occurred in Canada or in the United States, must be counted in applying the reconsigning tariff rule.

In this connection, the Court said in *Updike Grain Corporation v. St. Louis & S. F. Ry. Co.* (C.C.A. 8, 1931), 52 F.(2d) 94, at page 96:

> "While the decisions of the Interstate Commerce Commission are not conclusive here, they are of great weight. They are especially persuasive in this highly technical field of rate construction and rate interpretation."

In *Boston & Maine Railroad v. Hooker* (1914), 233 U.S. 97, the Interstate Commerce Commission had required an amendment to a tariff schedule. In commenting upon this fact, the Supreme Court said at page 118:

> "This requirement is a practical interpretation of the law by the administrative body having its enforcement in charge, and is entitled to weight in construing the act."

Appellee's position and reasons therefor will be more fully developed and indicated in connection with its comments upon the arguments presented by appellant.

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[1]The decision is not reported but was rendered in response to informal complaint filed by Colorado Mill & Elevator Co. pursuant to provisions of Rule 25 of the General Rules of Practice of the Interstate Commerce Commission.

SPECIFICATIONS OF, AND COMMENTS UPON, APPELLANT'S POSITION

(a) Appellant's Statement as to Application of a Particular Carrier's Tariff.

It is difficult to understand the point which appellant is attempting to make in connection with the opening statement of its argument set forth in paragraph numbered 1 on page 11 under the heading "The Charges Are Computed According to the Rates and Rules Published by the Carrier Transporting the Goods."

In so far as the various contracts referred to by appellant in this section are concerned, the important fact to bear in mind is that the shipments moved from various points in Canada, originally destined to Ogden, Utah, as through shipments. The various contracts of carriage were subsequently modified to the extent that the original destination of the shipments was changed to Spokane, Washington, and later to Petaluma, California.

We agree wholeheartedly with the well settled principle set forth on page 12 of appellant's brief, reading:

> "Diversion and reconsignment are governed by the rules of the carrier upon whose rails the diversion or reconsignment is effective. *Kansas City Hay Dealers v. Atchison, T. & S. F. Ry. Co.*, 74 I.C.C. 352, 356."

Application of this principle to the facts of this case resolves the entire controversy. The Great Northern Rules Tariff sets the terms under which the diversion privilege is granted, and if a shipper avails himself of the privilege, he is bound by those terms. When the number of stops for inspections or diversions is computed, as provided in that rule, it is necessary to assess a combination of rates at Spokane as was done by appellee.

(b) The Argument That Rule 143 Is Applicable Only to Events While Cars in Possession of Great Northern Railway.

In its argument in points 2 and 3 commencing at page 14 and continuing to the bottom of page 17 in appellant's opening brief it is contended that rates covering transportation in the United States cannot be determined by events which took place in a foreign country, such as Canada. The reasoning appears to be that in order to apply a rule of the reconsigning tariff it must be first connected with the tariff containing the rate charged for transportation of a shipment; and since the tariff containing the rate for the Canadian portion of the movement is not on file with the Interstate Commerce Commission, neither the Canadian rate factor nor any acts in Canada can be considered in determining charges for movement in the United States.

The reasoning is not entirely correct because there must also be borne in mind the tariff interpretation rule quoted at page 12 of appellant's brief, as follows:

> "Diversion and reconsignment are governed by the rules of the carrier upon whose rails the diversion or reconsignment is effected. *Kansas City Hay Dealers v. Atchison, T. & S. F. Ry. Co.,* 74 I.C.C. 352, 356."

Furthermore, appellant overlooks the fact that application of the Great Northern Rules Tariff has no effect upon the rate assessed for the movement in Canada, and that reference is made to an event that occurred in Canada only to comply with the explicit language of the Rules Tariff.

It is agreed that the rules in the reconsignment tariff have application only when the tariff naming the line haul rates makes reference thereto and also that diversions and reconsignments are governed by the rules of the carrier upon whose rails the diversion or reconsignment is effected. Both of these factors are present in the instant case and justify the fact conceded by all concerned that the Great Northern Railway Rules Tariff under consideration is applicable to the instant shipments.

It is submitted that we are not here concerned with the rate charged for movement of the shipments in Canada, nor are we here concerned with any tariffs of Canadian railroads which are not on file with the Interstate Commerce Commission. We are here concerned only with an *event* that took place in Canada, i.e., the inspection of the cars in Canada after they had departed from their point of origin and last loading point; and we must do so in order to comply with the plain language of the tariff rule.

In this part of its brief appellant also makes reference to hypothetical facts and assumptions which it contends result in absurd conclusions as a result of following appellee's theory and the decision of the trial court. It is submitted that no good purpose will be served in attempting to answer such arguments, as this will only result in digressions which will have no bearing on the issue involved, and unduly prolong this brief. We are here concerned with a specific factual situation, which alone should be given consideration in determining the application of the tariff rule involved.

Appellant also indicates some doubt with respect to the point of origin of the shipments, subject of this litigation.

Such a statement comes as a surprise in view of the stipulated facts upon which the trial was conducted, the statements made by the trial court in reaching a decision and the specific findings of fact made by the trial court. It is submitted that no fact is more clearly established by the record in this case than the fact that the last point of loading and the point of origin of each of the shipments was at the point of shipment named in the bills of lading executed by the Canadian Pacific Railway (R. 30, 36, 50).

(c) Contention That Ambiguities and Doubts Must Be Resolved in Favor of Appellant.

In point 4 of its argument commencing at the bottom of page 17 of its brief appellant refers to the well settled rule of law to the effect that any ambiguities and doubts in a tariff must be resolved in favor of a shipper. No effort is made, however, to point out any ambiguity in the tariff rule under consideration. It is stated that freight bills were presented in two different ways, but it is difficult to follow appellant's reasoning that because this was done there was ambiguity in the tariff provision. It is not unusual for a railroad agent to prepare freight bills on a basis which he feels to be correct but which must be revised later to conform to the facts of a particular case.

In *Atlantic Coast Line R. Co. v. Atlantic Bridge Co., Inc.,* (C.C.A. 5, 1932) 57 F.(2d) 654, the court said at page 656:

> "The intention thus manifested in the words of the tariff is alone the intention to which the law gives effect. Beaumont, Sour Lake R.R. vs. Magnolia Provision Co., (C.C.A.) 26 F.(2d) 72."

See also *Pillsbury Flour Mills Company v. Great Northern Railway* (C.C.A. 8, 1928), 25 F.(2d) 66, where the court said at page 69:

> "Another cardinal rule in the construction of statutes is that effect is to be given, if possible, to every word, clause, and sentence. 36 Cyc. 1128; United States v. Ninety-Nine Diamonds, 139 F. 961, 2 L.R.A. (N.S.) 185 (C.C.A. 8); United States ex rel. Harris v. Daniels (C.C.A.) 279 F. 844; Hellmich v. Hellman, 18 F.(2d) 239 (C.C.A. 8)."

Attention is called to *Southern Pacific Company v. Southern Rice Sales Company* (Texas, 1943), 174 S.W.2d 1018, where the court said at page 1020:

> "* * * It is only after one knows the purpose for which the 26 cent rate was created that it becomes possible to read into the words of the tariff the meaning which appellee contends they have, and which appellant and the other steamship companies conceived that they have. *We cannot give effect to that purpose by amending, through construction, the tariff so as to make the tariff conform to the purpose of its framers, but which they failed to express. That would be to corrupt the meaning of the language used, not to construe it, to make it square with what was intended but not expressed.*" (Emphasis added)

In *Southern Pacific Co. v. Lothrop* (C.C.A. 9, 1926), 15 F.(2d) 486, the court said at page 487:

> "* * * Astute ingenuity might succeed in reading ambiguity into the language, but the ordinary, intelligent shipper would find none."

The foregoing statement is particularly applicable to the instant case, although the language of the tariff rule is

so clear and explicit that it is difficult to see how it can be argued that there is any ambiguity.

(d) Appellant's Argument with Respect to Subsequent Amendment of the Tariff Rule.

At the top of page 19 of appellant's brief it is stated:

> "Rule 143 originally gave the shipper two free inspections and reconsignments and required that the third be treated as a reshipment. The shipper had the option to count the inspections and reconsignments from either (a) the last point of loading, or (b) 'the point at which it becomes subject to combination of rates, as provided in this rule'."

Here in bold print the appellant states exactly what the Great Northern Railway Rules Tariff provides in plain and unambiguous language. It is gratifying to note, particularly, that appellant admits that under the applicable tariff a shipper had the option to count the inspections and reconsignments from either (a) the last point of loading, or (b) the point at which it becomes subject to combination of rates, as provided in this rule.

Appellant continues by saying that the tariff rule was amended by adding (c) "or the point where the car comes in possession of carriers within the United States." Even though it is a fact, as stated by appellant, that the amendment was designated "for clarification purposes" a reading of the entire amended rule indicates quite clearly that all that was done by the carriers was to add a third option to the two which had always been in effect.

It is submitted that amendment of the tariff rule has no effect upon the application or interpretation of the rule as it read at the time the involved shipments moved.

The plain language of the tariff rule with which we are concerned cannot be said to have a different meaning than that clearly indicated by its provisions merely because the amended rule contains an additional option.

It is submitted that the plain language of the tariff rule that the number of inspections or diversions shall be computed from the last point of loading or from the place where a shipment becomes subject to a combination of rates as provided in the rule, cannot be interpreted or in any way tortured to mean that the number of inspections should be computed from the border point merely because a subsequent tariff rule provides an *option* to do so. Such reasoning would flaunt all rules of logic and read into the original tariff rule a phrase which was not present at the time the involved shipments were transported. A complete answer to this contention of appellant is found in the case of *Louisville & Nashville Railroad Co. v. Speed-Parker, Inc.* (Fla., 1931) 137 So. 724, at page 728:

> "The controlling question involved in these cases depends upon the proper construction of the applicable tariffs and the Florida Railroad Commission's classification as they existed when the shipments in question moved. *The subsequent amendment by the defendant of the rate schedule, after the controversy had arisen, even though approved by the Railroad Commission, could not change the meaning or legal effect of the applicable rate schedule and classification in force when the cause of action, if any, arose.* As was said by the Circuit Court of Appeals for the Ninth Circuit, in Spokane, P. & S. Ry. Co. v. Lothrop, (*Southern Pacific Co. v. Lothrop*) 15 F.(2d) 486, 487: 'To avoid the peril involved in the possibility that the courts would take the view here con-

tended for by the defendant in error, they had the right to abrogate the clause, without impliedly admitting the validity of such a contention.' See, also Seaboard A. L. Ry. Co. v. Parks, 89 Fla. 105, 104 So. 587.

"Furthermore, the statutes make it the duty of the carrier to collect the lawfully published and established rate, notwithstanding its consent or agreement not to do so, or the fact that it may have, in the absence of such statutes conducted itself in such a manner as to estop itself from the collection of the correct rate. Pittsburgh, C. C. & St. L. Ry. Co. v. Fink, 250 U. S. 577, 40 S. Ct. 27, 63 L.Ed. 1151. *Therefore, the amendment by the defendant to its tariff with the approval of the Railroad Commission, made after this controversy had arisen, was, in our opinion, immaterial and irrelevant, and should not have been admitted in evidence.*" (Emphasis added)

It will be noted that the above decision cites and quotes with approval from the case of *Southern Pacific Co. v. Lothrop* (C.C.A. 9, 1926) 15 F.(2d) 486, decided by this honorable court. In that case the carrier had eliminated a part of the applicable tariff provision subsequent to movement of the involved shipments, to which fact the court attached no significance in connection with its interpretation of the tariff as it existed at the time of movement of the involved shipments.

(e) Argument That Appellant's Lawful Interpretation Should Be Favored Over Plaintiff's (Appellee's) Unlawful Interpretation —an Attempt to Raise a Question as to Reasonableness of the Tariff Provision.

Appellant opens its argument with respect to the above subdivision with the following quotation at page 20 of its brief:

> "It has long been settled that a published tariff rate is to be treated as though it were a statute binding upon both the carrier and the shipper, and that it must be strictly applied regardless of hardships that may arise from its application in particular cases. *Bull. S. S. Lines, Inc. v. Thompson,* (C.A. 5), 123 F. (2d) 943, 944; citing *Pennsylvania R. Co. v. International Coal Co.,* 230 U.S. 184, and *Louisville & N. R. Co. v. Maxwell,* 237 U.S. 94. See *Pillsbury Flour Mills v. Great Northern R. Co., supra.*"

Appellee does not question this well settled principle of law, but on the contrary urges its application in the determination of this controversy and particularly calls attention to that part of the quotation that a tariff rule "must be strictly applied regardless of hardships that may arise from its application in particular cases."

The main argument here presented by appellant is directed to the reasonableness of the tariff provision and an attempt is made to show that the interpretation and conclusion reached by the trial court is unjust, unreasonable, discriminatory, prejudicial and unlawful.

The identical proposition was considered by this honorable court in the case of *Reconstruction Finance Corporation v. Spokane, P. & S. Ry. Company* (C.C.A. 9, 1948), 170 F.(2d) 96. In that case there was a controversy as to

which of two rates should be applied to the involved shipment. The shipper presented a traffic expert who testified that in his opinion the item providing for the lower (in bond) rate was the applicable one. It appears that thereafter an effort was made to introduce certain tariff schedules as exhibits in support of the witness's testimony. It was said at page 97:

> "The court understood the exhibits were being offered as 'substantive' evidence and declined to receive them as such, but stated: 'He [the witness] can say that the reason he bases his opinion (that all shipments, tax unpaid, come under the lower rate) is because he has examined the tariffs of other lines and that they did adopt that procedure.' Whereupon, the witness made a rather lengthy non-responsive statement ending as follows: 'Therefore, it seems to me, it necessarily follows logically that they [the shippers] should not be called upon to pay 60 cents a gallon, a rate based on carrier's responsibility of 60 cents a gallon plus the tax.' Thus the witness, instead of proceeding along the line of the court's suggestion, rationalized the applicable facts which he thought a proper basis for the application of a certain rate, into the conclusion that such rate therefore was the legal one. This was fair argument to the rate maker, but the district court is not the rate maker."

Following the above statement, reference was made to a footnote which appears below:

> "'Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a compari-

son of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions, are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body, so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals.' Pennsylvania R. Co. v. International Coal Min. Co., 230 U.S. 184, 185, 196, 33 S.Ct. 893, 895, 57 L.Ed. 1446, Ann. Cas. 1915A, 315."

The argument which is being made by the appellant in the instant case might well be directed to the Interstate Commerce Commission which, as this court well knows, based upon the foregoing authority, is the only body which can determine whether a rate or tariff provision is reasonable or discriminatory. It is well settled of course that this court can give no consideration to such matters and is bound to interpret the tariff provision in accordance with its plain and unambiguous language.

In the case of *Davis v. Portland Seed Co.* (1924), 264 U.S. 403, 68 L.Ed. 762, the carrier had published a rate which admittedly violated the so-called long and short haul clause of the Interstate Commerce Act. Violation of the latter provision subjected the carrier to possible penalty and the plaintiff contended in its action to recover overcharges paid to the carrier that that fact made the rate charged on the shipments unlawful so that the only

applicable rate was the lower one in effect from a more distant point via the same route. The Court said at page 424:

> "The record shows, we think, that the carrier violated the statute by publishing the lower rate for the longer haul without permission and, *prima facie* at least, incurred the penalties of § 10. * * * But mere publication of the forbidden lower rate did not wholly efface the higher intermediate one from the schedule and substitute for all purposes the lower one, as a supplement might have done, without regard to the reasonableness or unreasonableness of either."

In giving judgment for the carrier, the court said at page 425:

> "The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified. It commanded adherence to the published rate from Roswell; § 6 forbade any other charge. Observance of the lower rate from Pecos, put in without authorization, might have been forbidden, as pointed out in United States v. Louisville & N. R. Co., 235 U.S. 314, 322, 323, 59 L.ed. 245, 251, 252, 35 Sup. Ct. Rep. 113; but it would be going too far to hold, as respondent insists, that the unauthorized publication established the lower rate as the maximum permissible charge from the intermediate point—the only rate therefrom which could be demanded."

See also, *Mobile & O. R. Co. v. Southern Sawmill Co.* (Mo., 1923), 251 S.W. 434, where the court said at page 436:

> "We begin with the thoroughly settled rule that the legal rate is the *filed* rate, and it is the duty of the

carrier to charge and collect the rate precisely as same is contained in the tariffs on file with the Interstate Commerce Commission. And this is so even though such rate be excessive, unreasonable and unlawful. (Citing Pittsburgh v. Fink, 250 U.S. 577; L. & N. Railroad Co. v. Maxwell, 237 U.S. 94; Dayton Coal Co. v. C. N. & T. P. Railroad Co., 239 U.S. 446; Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U.S. 185; Armour Packing Co. v. U.S., 209 U.S. 56, and many others)."

Bearing in mind the fundamental fact that both appellant and appellee agree that the provisions of the Great Northern Railway Rules Tariff under consideration are applicable to the involved shipments, it is submitted that the foregoing authorities require this court to follow the unequivocal language of that tariff and affirm the decision of the trial court.

(f) Appellant's Contention That Diversion Accomplished at Sweetgrass Should Be Treated as a Reshipment.

The final argument presented by the appellant commencing at the top of page 23 of its brief is certainly unique and novel. It necessarily concedes, for the purpose of making this argument at least, that the Canadian inspection should be counted under the provisions of the Great Northern Railway Rules Tariff. It seeks to avoid the result which must flow from application of the tariff in this manner, however, by stating that the reconsignment at Sweetgrass should be treated as a reshipment.

It should be remembered that reconsignment is a privilege which a carrier may or may not grant and that the carrier may prescribe any restrictions it feels proper. If

a reconsignment is permitted within the limitations set forth in a carrier's tariff the through rate is ordinarily applicable in the same manner as if the reconsignment had not been made. It is important, however, that a shipper fully comply with the conditions in a carrier's tariff in order that it may be accorded the privilege extended by a carrier. This is readily apparent from the quotation in the case of *Detroit Traffic Association v. Lake Shore & M. S. R. Co.,* 21 I.C.C. 257, 258, which is set forth at pages 24 and 25 of appellant's brief, from which the following is quoted:

> "* * * while reconsignment is a privilege that exists only under the permission granted in the tariff and that must be exercised only under the rules and conditions there laid down."

The instant shipments were never intended for delivery at Sweetgrass, Montana. Their original destination *as through shipments* under the bill of lading contracts executed at the points of origin in Canada was Ogden, Utah. The appellant's reconsignment instructions were contained in a letter dated April 12, 1944, addressed by Earl C. Corey, Regional Director of the Commodity Credit Corporation at Portland, Oregon, to Great Northern Railway Company at Portland, Oregon (R. 69). Six of the shipments were in the course of transportation to Ogden, Utah, at the time the reconsignment instructions were furnished and two of the shipments did not commence their transportation to Ogden, Utah, until a subsequent date (R. 36).

The appellant's reconsignment instructions were accomplished at Sweetgrass not because of any fiction of re-

shipment from that point but solely for the reason that that happened to be the most convenient point from the standpoint of railroad operation where those instructions could be accomplished.

It is difficult to understand how there could be a "reshipment" from Sweetgrass because the shipments were not destined to that point and at no time came to rest at that point as the termination of a transportation journey. The appellant's reconsignment instructions requested a change in destination of the shipments from Ogden, Utah, to Spokane, Washington, and as indicated herein this change happened to be made effective at Sweetgrass. There is absolutely nothing under the facts or by way of any fiction which would constitute a reshipment from that point.

CONCLUSION

For the reasons indicated herein, the judgment and opinion of the trial court is correct and should be affirmed.

Dated San Francisco, Calif.,
April 26, 1950

Respectfully submitted,

GEORGE L. BULAND,
A. T. SUTER,
Attorneys for Appellee.

(Appendix follows)

APPENDIX A

INTERSTATE COMMERCE COMMISSION
Office of the Sec'ty
Washington 25

April 12, 1946
174124

Mr. L. B. Fitzgerald, T.M.
Colorado Milling & Elevator Co.
Denver, Colorado

Dear Sir:

Further reference is made to the above informal complaint respecting the charges on a carload of wheat moving from Nobleford, Alberta, on July 25, 1944, to Los Angeles, Cal.

The shipment was inspected north of the U. S.-Canadian Border, inspected at and subsequently diverted or reconsigned from Spokane, Wash., to Canoga Park, Cal., rediverted at Klamath Falls, Ore., to Los Angeles, where delivery was accomplished. Charges were assessed at a combination rate of 114 cents, composed of factors of 14 cents origin to Sweetgrass, 56 cents Sweetgrass to Klamath Falls, and 44 cents beyond.

S. P. I.C.C. 4574, Sup. 24, in effect on the date of origin of the shipment, provides that not more than two inspections, or one inspection in addition to a diversion or reconsignment enroute, will be permitted, except that if, after the car has received the two inspections, or one inspection and one diversion or reconsignment enroute, it is subsequently inspected, diverted or reconsigned and forwarded without unloading, it will be subject to the com-

bination of rates applicable on a shipment terminating at and on a shipment originating at the point at which such subsequent inspection, diversion or reconsignment is performed in effect on the date of shipment from point of origin. The number of stops for inspection, diversion or reconsignment shall be reckoned from the last point of loading of car or from the point at which it becomes subject to combination of rates as provided in the item.

It is plain that the point and date of origin of the shipment are Nobleford, July 25, 1944; that the last and only point of loading of car is Nobleford; that the shipment received two inspections and one diversion or reconsignment between Nobleford and its departure from Spokane; that, under the terms of the Rule, the shipment became subject to the combination rate at the point where it received its diversion after the two previous inspections; that the shipment was entitled to the diversion reckoned from the point at which it became subject to the combination rate. It is our informal view that the applicable combination rate is based on Spokane rather than Klamath Falls, provided there is nothing in the tariffs to the contrary. None of the tariffs naming the linehaul rates have been examined nor have we determined the applicable charge for inspection or diversion.

The complainant urges that as the factor from origin to the border is not on file with this Commission the provisions of the Rule apply only to that portion of the transportation in the U. S., and that the Canadian inspection is not to be considered. The Rule in the S. P. tariff sets the terms under which the diversion privilege is granted, and if the shipper avails himself of the privilege, he is bound

by the terms thereof. The Rule is plain that its terms apply from point of origin of the shipment on the date of origin, and we are unable to conclude that the shipment originated at the boundary on the date it was forwarded therefrom. The complaint is denied on the informal docket and attention called to Rule 25(f) of the Rules of Practice.

Respectfully,

W. P. Bartel